NO. 44922-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

JOSE ALONSO BERNAL-MARTINEZ, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.12-1-00509-5

BRIEF OF RESPONDENT AND RESPONSE TO PERSONAL RESTRAINT PETITION

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B. STATEMENT OF THE CASE

Jose Bernal-Martinez (hereafter 'Bernal-Martinez') was charged by information with Possession of a Controlled Substance with Intent to Deliver-Heroin. CP 3. The State further alleged this act occurred within 1,000 feet of a school bus route stop and that it was a major violation of the Uniform Controlled Substances Act. CP 3. Bernal-Martinez was charged along with a co-defendant, Ponce-Gutierrez. CP 3.

Prior to trial, Bernal-Martinez filed a motion to suppress evidence, arguing that the stop of his co-defendant's vehicle was unlawful, that his co-defendant did not voluntarily consent to a search of the residence, and that Bernal-Martinez did not voluntarily consent to a search of the residence. CP 5-19. The trial court held a CrR 3.6 suppression hearing wherein the State presented testimony of Deputy Kevin Jones, RP 4-57,

and Detective Shane Hall. RP 70-136. The testimony of these two police officers showed that during an investigation of a person suspected of delivering drugs in Oregon, Ponce-Gutierrez was observed in contact with the Oregon suspect. RP 7-10. After seeing the person who was later identified as Ponce-Gutierrez interact with a suspected drug deliverer, police from Portland, Oregon, followed Ponce-Gutierrez to an apartment in Vancouver, Washington. RP 11-12. Portland police soon gave up following Ponce-Gutierrez and returned to Oregon. RP 13. Later in the day, Deputy Jones made contact with the suspected drug deliverer in Oregon and interviewed him. RP 14. This person told Deputy Jones that he had received drugs from the person later identified as Ponce-Gutierrez during the meeting the police had observed earlier in the day. RP 15-16. With that information, Deputy Jones contacted law enforcement in Vancouver, Washington, to help investigate. RP 16-17.

Deputy Jones returned to Vancouver to see if he could find Ponce-Gutierrez. RP 18. Members of the Clark-Skamania Drug Task Force joined him. RP 18. They observed Ponce-Gutierrez come out of the apartment and get into the same vehicle he had been in earlier that day and drive away. RP 18. A traffic stop was then executed by members of the Clark-Skamania Drug Task Force. RP 19. Detective Shane Hall made contact with Ponce-Gutierrez, the driver and sole occupant of the vehicle

stopped. RP 80. Detective Hall asked Ponce-Gutierrez if he spoke English and when he said no, Detective Hall proceeded to converse with him in Spanish. RP 81. Detective Hall received his Bachelor's Degree in Spanish with high honors, studied Spanish in Junior High and High School, lived and worked in Mexico speaking Spanish for two years, and his job duties include interpreting Spanish for federal, state and local law enforcement agencies. RP 81-82. Hall also is certified by the Oregon State Police as a Spanish communications facilitator. RP 82.

Once contacted, Hall told Ponce-Gutierrez that police were concerned he was involved in illegal drug activity and they wanted to speak with him. RP 81. During their conversation, Ponce-Gutierrez told Hall that he lived at the apartment where the police had observed him coming and going. RP 83. Hall told Ponce-Gutierrez that he was concerned Ponce-Gutierrez had drugs or firearms in his vehicle or apartment and wanted permission to search those locations. RP 85. Ponce-Gutierrez said they could search both locations. RP 85. Hall then explained the *Ferrier* warnings to Ponce-Gutierrez, telling him he had the right to refuse, revoke or limit the scope of the search at any time. RP 85-86. Ponce-Gutierrez told Hall he understood and was still willing to allow the search. RP 86. Nothing of interest was located in Ponce-Gutierrez's vehicle. RP 87. Sometime during this conversation, Hall also

asked Ponce-Gutierrez if there would be other people in his apartment, and Ponce-Gutierrez said he was the sole occupant and no one else would be at the apartment. RP 90.

Ponce-Gutierrez was not a licensed driver, so Hall asked him if they could park his vehicle in the nearby parking lot while they returned to his apartment, and Ponce-Gutierrez agreed. RP 87. Hall asked Ponce-Gutierrez if he could drive him back to the apartment in Hall's non-marked, undercover vehicle. RP 88. Ponce-Gutierrez agreed. RP 88. Ponce-Gutierrez rode in the front seat of the vehicle with Hall. RP 88. Once at the apartment complex, Ponce-Gutierrez led them to his apartment and opened the door with his keys. RP 23-24, 89. Ponce-Gutierrez never indicated he wished to revoke his consent or limit the scope of the search, or refuse consent to search his apartment. RP 89. Several police officers, including Hall, entered the apartment after Ponce-Gutierrez. RP 89. Upon entering the apartment, Hall observed another person, later identified as Bernal-Martinez, in the apartment. RP 90. Hall was surprised to see him there given the information Ponce-Gutierrez had given him. RP 91. He asked Bernal-Martinez who he was, speaking to him in Spanish, and Bernal-Martinez presented a voter ID card from Mexico with the name Jose Alonso Bernal-Martinez on it. RP 92. Hall asked Bernal-Martinez

where they could speak at and Bernal-Martinez told him they could speak in his bedroom. RP 93.

Once in Bernal-Martinez's bedroom, both Bernal-Martinez and Hall sat on the bed. RP 120. Hall told Bernal-Martinez that the police believed he and Ponce-Gutierrez were involved in drug trafficking and that they wanted to search the apartment for guns and drugs and other contraband. RP 94. Hall advised Bernal-Martinez of his rights under *Ferrier* from a pre-printed form in Spanish. RP 94. Bernal-Martinez signed the document and gave his consent for police to search the apartment. RP 94-95.

Hall re-contacted Ponce-Gutierrez in the apartment and gave him a written consent form, also in Spanish, explaining his rights under *Ferrier* and Ponce-Gutierrez signed this document as well. RP 95. Police then searched the apartment, and Hall continued to have contact with Bernal-Martinez during the search. RP 96. At no time did Bernal-Martinez withdraw his consent or limit his consent for the search of the apartment. RP 96. During the search, Hall informed Bernal-Martinez of his *Miranda* rights and asked him if he understood those rights and whether he was willing to speak with police. RP 97-98, 126-28. Bernal-Martinez indicated he was willing to speak with him. RP 98. Hall then asked Bernal-Martinez if he was involved in trafficking narcotics, and Bernal-Martinez said yes.

RP 131-32. Bernal-Martinez indicated he was being paid to stash drugs at his house and that money found in his house was proceeds of drug sales. RP 132.

The search of the apartment revealed over $42,000.00 in United States currency and more than six pounds of heroin. RP 29-30, CP 41. There was $11,000.00 of currency found located in Bernal-Martinez's wallet. CP 41. A little more than $25,000.00 of the currency was found in a box in the hall closet of the apartment. RP 41. Almost $15,000.00 was found in a nightstand, and just under $1,000.00 was found on Ponce-Gutierrez. CP 42. The residence was within 1,000 feet of four school bus stop locations. CP 42.

The trial court denied Bernal-Martinez's motion to suppress evidence and entered findings of fact and conclusions of law. CP 34-39, RP 222-32. Bernal-Martinez chose to proceed with a stipulated facts trial to the bench. RP 237, 269, CP 30-32. The trial court entered findings of fact and conclusions of law on the non-jury trial. CP 40-43. The trial court found Bernal-Martinez guilty of Possession of a Controlled Substance with Intent to Deliver-Heroin and that this crime was committed within 1,000 feet of a school bus route stop. CP 43.

C. ARGUMENT

I. THE TRIAL COURT'S FINDINGS OF FACT ARE BASED UPON SUBSTANTIAL EVIDENCE AND ARE VERITIES ON APPEAL

Bernal-Martinez assigns error to nine of the trial court's findings of fact from the CrR 3.6 hearing. Findings entered by the court in a CrR 3.6 hearing are reviewed for substantial evidence. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. *Id.* at 644. Determining the credibility of witnesses during a CrR 3.6 hearing is within the province of the court. *State v. Nelson*, 89 Wn.App. 179, 181, 948 P.2d 1314 (1997).

Bernal-Martinez assigns error to several of the trial court's findings entered on the CrR 3.6 hearing, however offers no argument, case law, or explanation for how there was insufficient evidence to support the trial court's findings. In fact, there was substantial evidence for all of the trial court's findings. Findings which are supported by substantial evidence are verities on appeal. *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). The trial court based its findings off of the testimony of the witnesses at the CrR 3.6 hearing. It is clear the trial court weighed the evidence and found the testimony of Detective Hall and Deputy Jones to be more credible than the testimony of Bernal-Martinez or his co-

defendant, something within the trial court's province to find. The findings are supported by substantial evidence and are verities on appeal.

Bernal-Martinez specifically assigns error to findings of fact numbers 9, 12, 14, 15, 16, 21, 24, 25 and 27. Regarding finding of fact number 9, Bernal-Martinez alleges it was error for the trial court to find Detective hall is a fluent Spanish speaker. Br. of Appellant, p. 2. The evidence at the CrR 3.6 hearing showed Detective Hall studied Spanish at Idaho State University, receiving a Bachelor of Arts degree in Spanish, graduating with high honors. RP 81. Hall studied Spanish in Junior High and High School. RP 82. Detective Hall has lived and worked in Mexico for two years during which time over 95 percent of his conversations with people were with native Spanish speakers. RP 82. Detective Hall has received a certification from the Oregon State Police as a Spanish communications facilitator. RP 82. Part of his job duties include acting as an interpreter and assisting law enforcement agencies in interpreting Spanish. RP 82. Based on this testimony, which was uncontested, the trial court reasonably found that Detective Hall was "fluent in Spanish and has extraordinary history and abilities in the langue [*sic*], and indicated that he had no problem speaking the native language for Mr. Ponce-Gutierrez and Bernal-Martinez." RP 226. Finding of fact number 9 is supported by substantial evidence. Furthermore, Bernal-Martinez testified he

understood Detective Hall and that his Spanish was "easy for [him] to understand." RP 176.

Bernal-Martinez also assigns error to the trial court's reference to the residence as his co-defendant's "residence" and "home" as contained in findings of facts numbers 12, 14 and 16. Br. of Appellant, p. 2. However, Detective Hall testified that the co-defendant told him that he was the only occupant living at the apartment and that no one else would be there. RP 90. The trial court based its findings that the co-defendant told Detective Hall that he was the sole occupant of the residence on the substantial evidence presented by Detective Hall's testimony. This is an appropriate exercise of the trial court's authority to determine the credibility of witnesses and base its findings on the testimony of those witnesses it finds most credible. There is no error in the trial court's findings of fact numbers 12, 14 or 16, and those findings should be considered verities on appeal.

Bernal-Martinez also assigns error to the trial court's finding of fact number 15, wherein the trial court found that Detective Hall explained the *Ferrier* warnings to the co-defendant, Ponce-Gutierrez, and that Ponce-Gutierrez was informed he had the right to refuse consent, revoke consent or restrict the scope of the search, and that Ponce-Gutierrez indicated he was willing to allow a search, giving verbal consent. CP 36;

Br. of Appellant, p. 2. Detective Hall testified during the CrR 3.6 hearing that he informed Ponce-Gutierrez that they were concerned about drugs or firearms possibly being inside the vehicle or his residence and that he would like to search. RP 85. Detective Hall testified that Ponce-Gutierrez said, "Yes, you can go ahead and search." RP 85. Detective Hall then went on to explain the *Ferrier* warnings to Ponce-Gutierrez, telling him he had the right to refuse, revoke or limit the scope of the search at any time. RP 85-86. Ponce-Gutierrez indicated he understood and was still willing to allow the police to search. RP 86. The trial court's finding of fact number 15 is clearly supported by substantial evidence as Detective Hall's testimony, and the court's finding that he was credible, is sufficient to constitute substantial evidence. This finding should be treated as a verity on appeal.

Bernal-Martinez assigns error to finding of fact 21, wherein the trial court found Ponce-Gutierrez was a resident of the apartment that was searched. Br. of Appellant, p. 2. However, there is no error in the entry of this finding as testimony presented in court shows that Ponce-Gutierrez told Detective Hall he lived at the residence, Ponce-Gutierrez had a key to the apartment in his possession and opened the door and allowed police inside. RP 90. This finding of fact was based on substantial evidence and should be treated as a verity on appeal.

Bernal-Martinez assigns error to finding of fact numbers 24 and 25 to the extent it finds Bernal-Martinez was informed of his right to restrict the scope of consent. Br. of Appellant, p. 2-3. Bernal-Martinez raises this issue for the first time on appeal, and cites to outside sources, and evidence not in the record, to support his contention that he was improperly informed of his *Ferrier* warnings by an improper translation, an issue he never raised at the trial court level. As a general rule, appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a). Furthermore, a reviewing court will not consider matters outside the trial record on appeal. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (citing to *State v. Crane*, 116 Wn.2d 315, 335, 804 P.2d 10, *cert. denied*, 501 U.S. 1237, 111 S. Ct. 2867, 115 L.Ed.2d 1033 (1991) and *State v. Blight*, 89 Wn.2d 38, 45-46, 569 P.2d 1129 (1977)). Bernal-Martinez supports his argument on this issue by citing to a translation outside the record on appeal. Br. of Appellant, p. 16. This court should not consider the outside source on appeal, nor allow Bernal-Martinez to raise this issue for the first time on appeal. Had the State been properly notified of Bernal-Martinez's contention regarding the translation of the *Ferrier* warnings, it could have developed the facts and evidence presented below to then be able to sufficiently respond to this issue on appeal. The State was not given the opportunity to explore this issue at the trial court level,

by soliciting testimony from Detective Hall regarding the translation, or by calling additional witnesses who could testify regarding translation of documents, or by effectively cross-examining Bernal-Martinez regarding this issue. This is one reason why the appellate courts do not consider matters like this for the first time on appeal.[1] The trial court's finding is based upon evidence presented by Detective Hall, who indicated he did inform Bernal-Martinez of the *Ferrier* warnings, in Spanish. RP 94. This constitutes substantial evidence and should be considered a verity on appeal.

Bernal-Martinez assigns error to the trial court's oral findings of fact to the same extent as the above assignments of error. Br. of Appellant, p. 3. The trial court clearly weighed the evidence presented at the CrR 3.6 hearing and determined the credibility of the witnesses and based the findings of fact on the evidence presented at the hearing through the testimony of witnesses. This is clear from the oral findings made in court,

[1] Furthermore, if this Court were to consider evidence outside the record, Bernal-Martinez's citation to a google translator offers but a small picture of the translation of the word "registro." Like many languages, including English, some words have different meanings based upon the context in which they are used. A second translation of the word "registro" is "search" according to the Oxford Dictionary, available at www.oxforddictionaries.com/us/translate/spanish-english/registro. This document offers that in police contexts, the word "registro" is used to mean search warrant ("orden de registro") and also search, for example: "la policia ha efectuado 300 registros domiciliarios" is translated as "the police have carried out searches on 300 houses."

However, the State doubts this Oxford Dictionary offers a full picture of the translation of the word either. The word's meaning will depend upon the context in which it was used. This is why an issue should not be allowed to be raised for the first time on appeal when development of the record below is integral to deciding the issue.

and the written findings of fact and conclusions of law entered, as well as the court's clear statement that the court found certain evidence "as credible...." RP 229. Thus the court found, some witnesses more credible than others and this is reflected in his findings. No finding of fact entered by the trial court was based on anything except evidence found within the record. The trial court's findings were properly entered after considering the evidence. The trial court indicated it had "diligently listened, took notes, though provocatively about this issue..." when making its findings. RP 222. The trial court did not err in entering its findings of facts. All findings of fact contained in CP 34-38 are verities on appeal.

II. PONCE-GUTIERREZ HAD AUTHORITY TO CONSENT TO A SEARCH OF THE RESIDENCE

a. BERNAL-MARTINEZ CANNOT RAISE THIS ISSUE FOR THE FIRST TIME ON APPEAL

Bernal-Martinez did not raise this issue at the trial court below. Bernal-Martinez argued Ponce-Gutierrez's consent was not voluntarily given, however, he did not argue Ponce-Gutierrez lacked the authority to consent to a search of the residence in either his motion to suppress and brief in support or in his oral argument to the court. CP 5-19; RP 183-99. Generally, appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a). But if there is a manifest error affecting a constitutional right, it can be raised for the first time on appeal.

RAP 2.5(a)(3); *State v. Scott*, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988); *State v. Lynn*, 67 Wn.App. 339, 342, 835 P.2d 251 (1992). Not every constitutional error can be raised for the first time on appeal. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). To raise it for the first time on appeal, it must be a "manifest" error. *Id.* (citing *Scott, supra* at 688). To show an error is manifest, actual prejudice must be shown. *Scott*, 110 Wn.2d at 688; *Lynn*, 67 Wn.App. at 346.

When a defendant raises a suppression issue for the first time on appeal, he must show the trial court likely would have granted the motion if it was made. *McFarland*, 127 Wn.2d at 333-34. It is not enough that a defendant allege prejudice, he must show actual prejudice from the record. *Id.* at 334. Bernal-Martinez did not address this particular issue in his motion to suppress below. The record is therefore scant on how the court would have ruled. However, it is clear from the trial court's rulings that the trial court found Detective Hall to be credible, and that he found Detective Hall's testimony that Ponce-Gutierrez represented himself to be the sole resident of the apartment that was searched credible. CP 36. Therefore, to the extent that the record shows how the trial court would have ruled on whether Ponce-Gutierrez had authority to consent to a search, it is clear the trial court found Ponce-Gutierrez to have indicated to police he was a resident of the apartment and his possession of the key to

the apartment to show he was indeed a resident who had authority to consent to a search. Bernal-Martinez cannot show actual prejudice and in the absence of showing such prejudice, this potential error is not "manifest" and therefore not reviewable under RAP 2.5(a)(3). *See McFarland*, 127 Wn.2d at 334.

b. PONCE-GUTIERREZ HAD AUTHORITY TO CONSENT TO THE ENTRY INTO AND SEARCH OF THE APARTMENT

Even if this Court finds Bernal-Martinez's claim of error based on an allegation of lack of authority to consent may be raised for the first time on appeal, his claim still fails as Ponce-Gutierrez did have authority to consent to the search, and Bernal-Martinez gave consent prior to any search of the residence.

A consent search is a recognized exception to the warrant requirement. *State v. Hendrickson*, 129 Wn.2d 61, 70-71, 917 P.2d 563 (1996). To prove a valid consent exception to the warrant requirement, the State must show that the consent was voluntarily given, the person giving consent had authority to consent, and the search did not exceed the scope of the consent. *State v. Thompson*, 151 Wn.2d 793, 803, 92 P.3d 228 (2004); *State v. Nedergard*, 51 Wn.App. 304, 308, 753 P.2d 526 (1988). Regarding authority to consent to the search, Ponce-Gutierrez informed police he was the sole occupant and resident at the apartment. RP 90.

Police had no other information which indicated anyone else resided at the apartment, or reason to believe Ponce-Gutierrez was not telling them the truth. Furthermore, Ponce-Gutierrez had a key to the apartment in his possession. "Possession of a key is a strong indication of access and permission to enter...." *State v. Holmes*, 108 Wn.App. 511, 520, 31 P.3d 716 (2001). The trial court found Ponce-Gutierrez to be a resident of the apartment, and as discussed above, this finding was proper and is a verity on appeal.

Furthermore, a consensual entry is still valid even if the person giving consent lacks actual authority but has apparent authority and police have a reasonable belief in the authority. *Holmes*, 108 Wn.App. at 520 (citing *Illinois v. Rodriguez*, 497 U.S. 177, 186, 110 S. Ct. 2793, 111 L.Ed.2d 148 (1990)). It is clear from the testimony of Detective Hall and Deputy Jones that they were surprised to see another person inside the residence as they believed Ponce-Gutierrez to be the sole occupant. The standard for determining whether police were reasonable in relying upon someone's apparent authority is whether "the facts available to the officer at the moment [would] 'warrant a man of reasonable caution in the belief' that the consenting party had authority over the premises." *Id.* (quoting *Rodriguez*, 497 U.S. at 189 and *Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968)).

All the information available to the police at the time they obtained consent from Ponce-Gutierrez showed he had actual authority to consent to a search of the residence. Ponce-Gutierrez asserted he was the sole occupant of the residence, police had seen him twice that day coming and going from the residence, and he had a key to the residence on his person which he then used to unlock the door. There were no ambiguous circumstances or statements made by Ponce-Gutierrez that would have caused the police to doubt his habitation at the apartment. The police here acted appropriately in determining Ponce-Gutierrez had authority to enter the apartment and in reasonably relying upon that authority.

Finally, whether Ponce-Gutierrez had actual or apparent authority to allow entry and search of the residence is somewhat moot, in that immediately upon finding another person inside the residence, Bernal-Martinez, police discussed the issue with him and obtained his consent to search the residence. CP 37. This consent was obtained prior to any search of the residence. CP 37-38. Therefore, it is of little moment whether Ponce-Gutierrez appropriately consented to the search of the residence as Bernal-Martinez did prior to any search taking place. Bernal-Martinez's claim fails.

III. BERNAL-MARTINEZ'S CONSENT WAS VOLUNTARILY GIVEN

Bernal-Martinez alleges his consent to search his residence was not voluntarily given. The evidence presented, however, shows Bernal-Martinez was properly informed of the *Ferrier* warnings and was in no way coerced into allowing a search of his home. His consent was voluntarily given and the evidence obtained was appropriately deemed admissible at trial.

Whether consent is voluntarily given is question of fact. *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966). This question is based on the totality of the circumstances and the court should consider whether *Miranda* warnings were given, the degree of education and intelligence of the consenting person, and whether the consenting person was advised of his right not to give consent. *State v. Reichenbach*, 153 Wn.2d 126, 132, 101 P.3d 80 (2004). The trial court below entered findings that Detective Hall spoke with Bernal-Martinez, provided him with a Spanish version of the *Ferrier* warnings, orally discussed *Ferrier* with Bernal-Martinez, and that Bernal-Martinez indicated he understood the warnings and was willing to consent to a search of his residence. CP 37. As discussed above, these findings are supported by substantial evidence and are verities on appeal. The trial court further found that there

was no coercion of Bernal-Martinez in obtaining his consent. RP 228. The trial court stated,

> The consent was not a product of any coercion by law enforcement. I think that was—was answered most definitively by Mr. Bernal-Martinez when he was on the stand, and he indicated that, in his discussions with Detective Hall, that Detective Hall did not have a warrant with him and—and Detective Hall—and Bernal-Martinez asked Detective Hall if he was going to –what he would do if he objected, and Mr. – Detective Hall said that "I'm—I'm not going to tell you that because I don't want to influence you. I don't want to be coercive in this—in this case to get your consent."

RP 228-29.

This evidences that it was clear to Bernal-Martinez that he had the right not to consent to a search of his residence and that police did not want to coerce him to do anything, one way or the other. Bernal-Martinez's argument that he did not freely give consent is without any merit.

Though Bernal-Martinez is accurate, he had not yet been given *Miranda* warnings at the time of his consent, and he may not have had a high school or college degree, the trial court properly found he was intelligent enough to understand the situation and choose whether to consent to a search of his residence. Further, Bernal-Martinez himself did not claim a lack of understanding regarding what was going on. RP 163-81. The trial court was in the best position to evaluate Bernal-Martinez's

ability to give consent as the court was able to observe Bernal-Martinez on the stand and his ability to understand and answer questions posed of him. It is clear Bernal-Martinez was intelligent enough to understand his ability to consent. This is also evidenced by his testimony that he asked the police officer whether he had obtained a search warrant. RP 179-80.

Bernal-Martinez claims he was coerced into giving consent because he was not first asked if police could enter his home. However, Ponce-Gutierrez, as at a minimum, a co-resident, had given permission to the police to enter the residence. A co-resident has the actual authority, and Ponce-Gutierrez had the apparent authority, to allow police to enter the common areas of a residence. *See State v. Hoggatt*, 108 Wn.App. 257, 269, 30 P.3d 488 (2001) (holding a cohabitant may admit guests into the living areas of a home even when another cohabitant is present). There is no evidence the police exceeded the scope of this area until they received permission from Bernal-Martinez to search the home.

Bernal-Martinez also claims on appeal he was coerced into giving consent to the search by the presence of police officers. However, the mere presence of police officers is not evidence of coercion. Detective Hall asked to speak to Bernal-Martinez, who offered up his bedroom, a quiet space where only Hall and Bernal-Martinez were present, away from any potential coercive atmosphere created by police presence. Detective

Hall put himself on Bernal-Martinez's level by sitting with him on a bed in the room, not standing over him in an imposing or threatening manner. In *State v. Flowers*, 57 Wn.App. 636, 789 P.2d 333 (1990), the Court on appeal found that consent obtained after a defendant was ordered out of his room by gunpoint, ordered to kneed with his hands behind his head while an officer placed a leg between his knees and a knee of his spine to restrain him, was not unduly coercive. *Flowers*, 57 Wn.App. at 645-46. The Court found that the defendant in *Flowers* acknowledged that no one had threatened to get a search warrant if he did not consent, and that it was evident from the record he was not of low intelligence or totally naïve in criminal matters. *Id.* at 646. These factors bore on whether the consent the defendant in *Flowers* gave was voluntary or was based on coercion. *Id.* The Court found no indication that the defendant's consent was the product of coercion, and upheld that the consent to search was voluntary. *Id.* at 647.

The same is true in Bernal-Martinez's case. It is evident from his exchange with Detective Hall and his testimony that he was not totally naïve in criminal matters and that he was not of low intelligence. Further, Bernal-Martinez was not subjected to nearly the coercive type of environment that the defendant in *Flowers, supra* had been subjected to. Only one of four witnesses at the CrR 3.6 hearing testified that a gun was

drawn and the trial court did not make a finding that any gun had been drawn. Even Bernal-Martinez acknowledged that he spoke to the detective in a private room, both sitting on a bed, and that the officer indicated he had no intention of threatening him or implying he would search without his consent. RP 171, 173-74. Bernal-Martinez also acknowledged Detective Hall gave him a form explaining his rights regarding consent in Spanish and that he signed that form. RP 174-75. It is clear from the totality of the circumstances that Bernal-Martinez's consent to search the residence was freely and voluntarily given. His claim on appeal has no merit.

IV. THE EVIDENCE WAS PROPERLY ADMITTED

As the search of Bernal-Martinez's home was properly done after consent was freely and voluntarily given after being advised of his rights to refuse, revoke or limit the search, the evidence police obtained upon the search was properly deemed admissible by the trial court. Bernal-Martinez's claim that the evidence should have been suppressed is without merit. Bernal-Martinez's conviction should be affirmed.

D. CONCLUSION

The trial court made proper findings of fact based upon substantial evidence presented at the CrR 3.6 hearing below. Bernal-Martinez and his

co-defendant, Ponce-Gutierrez, both gave consent after being properly advised of their rights under *Ferrier*. There was no error below, and as the search was valid, the evidence was admissible at trial. The trial court should be affirmed in all respects.

PART TWO – PERSONAL RESTRAINT PETITION

A. IDENTITY OF RESPONDENT AND AUTHORITY FOR RESTRAINT

The State of Washington is the Respondent in this matter. Jose Bernal-Martinez is restrained pursuant to the judgment and sentence of the Clark County Superior Court under cause number 12-1-00509-5. A copy of the judgment and sentence is attached as Appendix A.

B. STATEMENT OF THE CASE

Jose Bernal-Martinez (hereafter 'Bernal-Martinez') was charged by information with Possession of a Controlled Substance with Intent to Deliver-Heroin. CP 3.[2] The State further alleged this act occurred within 1,000 feet of a school bus route stop and that it was a major violation of the Uniform Controlled Substances Act. CP 3. Bernal-Martinez was charged along with a co-defendant, Ponce-Gutierrez. CP 3.

[2] The State refers to the record (Clerk's Papers and Report of Proceedings) involved in the consolidated Direct Appeal. Bernal-Martinez's Personal Restraint Petition, COA #46041-6 was consolidated with his Direct Appeal under COA #44922-6 by order of this Court on May 7, 2014.

Prior to trial, Bernal-Martinez filed a motion to suppress evidence, arguing that the stop of his co-defendant's vehicle was unlawful, that his co-defendant did not voluntarily consent to a search of the residence, and that Bernal-Martinez did not voluntarily consent to a search of the residence. CP 5-19. The trial court held a CrR 3.6 suppression hearing wherein the State presented testimony of Deputy Kevin Jones, RP 4-57, and Detective Shane Hall. RP 70-136. The testimony of these two police officers showed that during an investigation of a person suspected of delivering drugs in Oregon, Ponce-Gutierrez was observed in contact with the Oregon suspect. RP 7-10. After seeing the person who was later identified as Ponce-Gutierrez interact with a suspected drug deliverer, police from Portland, Oregon, followed Ponce-Gutierrez to an apartment in Vancouver, Washington. RP 11-12. Portland police soon gave up following Ponce-Gutierrez and returned to Oregon. RP 13. Later in the day, Deputy Jones made contact with the suspected drug deliverer in Oregon and interviewed him. RP 14. This person told Deputy Jones that he had received drugs from the person later identified as Ponce-Gutierrez during the meeting the police had observed earlier in the day. RP 15-16. With that information, Deputy Jones contacted law enforcement in Vancouver, Washington, to help investigate. RP 16-17.

Deputy Jones returned to Vancouver to see if he could find Ponce-Gutierrez. RP 18. Members of the Clark-Skamania Drug Task Force joined him. RP 18. They observed Ponce-Gutierrez come out of the apartment and get into the same vehicle he had been in earlier that day and drive away. RP 18. A traffic stop was then executed by members of the Clark-Skamania Drug Task Force. RP 19. Detective Shane Hall made contact with Ponce-Gutierrez, the driver and sole occupant of the vehicle stopped. RP 80. Detective Hall asked Ponce-Gutierrez if he spoke English and when he said no, Detective Hall proceeded to converse with him in Spanish. RP 81. Detective Hall received his Bachelor's Degree in Spanish with high honors, studied Spanish in Junior High and High School, lived and worked in Mexico speaking Spanish for two years, and his job duties include interpreting Spanish for federal, state and local law enforcement agencies. RP 81-82. Hall also is certified by the Oregon State Police as a Spanish communications facilitator. RP 82.

Once contacted, Hall told Ponce-Gutierrez that police were concerned he was involved in illegal drug activity and they wanted to speak with him. RP 81. During their conversation, Ponce-Gutierrez told Hall that he lived at the apartment where the police had observed him coming and going. RP 83. Hall told Ponce-Gutierrez that he was concerned Ponce-Gutierrez had drugs or firearms in his vehicle or

apartment and wanted permission to search those locations. RP 85. Ponce-Gutierrez said they could search both locations. RP 85. Hall then explained the *Ferrier* warnings to Ponce-Gutierrez, telling him he had the right to refuse, revoke or limit the scope of the search at any time. RP 85-86. Ponce-Gutierrez told Hall he understood and was still willing to allow the search. RP 86. Nothing of interest was located in Ponce-Gutierrez's vehicle. RP 87. Sometime during this conversation Hall also asked Ponce-Gutierrez if there would be other people in his apartment, and Ponce-Gutierrez said he was the sole occupant and no one else would be at the apartment. RP 90.

Ponce-Gutierrez was not a licensed driver, so Hall asked him if they could park his vehicle in the nearby parking lot while they returned to his apartment, and Ponce-Gutierrez agreed. RP 87. Hall asked Ponce-Gutierrez if he could drive him back to the apartment in Hall's non-marked, undercover vehicle. RP 88. Ponce-Gutierrez agreed. RP 88. Ponce-Gutierrez rode in the front seat of the vehicle with Hall. RP 88. Once at the apartment complex, Ponce-Gutierrez led them to his apartment and opened the door with his keys. RP 23-24, 89. Ponce-Gutierrez never indicated he wished to revoke his consent or limit the scope of the search, or refuse consent to search his apartment. RP 89. Several police officers, including Hall, entered the apartment after Ponce-Gutierrez. RP 89. Upon

entering the apartment, Hall observed another person, later identified as Bernal-Martinez, in the apartment. RP 90. Hall was surprised to see him there given the information Ponce-Gutierrez had given him. RP 91. He asked Bernal-Martinez who he was, speaking to him in Spanish, and Bernal-Martinez presented a voter ID card from Mexico with the name Jose Alonso Bernal-Martinez on it. RP 92. Hall asked Bernal-Martinez where they could speak at and Bernal-Martinez told him they could speak in his bedroom. RP 93.

Once in Bernal-Martinez's bedroom, both Bernal-Martinez and Hall sat on the bed. RP 120. Hall told Bernal-Martinez that the police believed he and Ponce-Gutierrez were involved in drug trafficking and that they wanted to search the apartment for guns and drugs and other contraband. RP 94. Hall advised Bernal-Martinez of his rights under *Ferrier* from a pre-printed form in Spanish. RP 94. Bernal-Martinez signed the document and gave his consent for police to search the apartment. RP 94-95.

Hall re-contacted Ponce-Gutierrez in the apartment and gave him a written consent form, also in Spanish, explaining his rights under *Ferrier* and Ponce-Gutierrez signed this document as well. RP 95. Police then searched the apartment and Hall continued to have contact with Bernal-Martinez during the search. RP 96. At no time did Bernal-Martinez

withdraw his consent or limit his consent for the search of the apartment. RP 96. During the search, Hall informed Bernal-Martinez of his *Miranda* rights and asked him if he understood those rights and whether he was willing to speak with police. RP 97-98, 126-28. Bernal-Martinez indicated he was willing to speak with him. RP 98. Hall then asked Bernal-Martinez if he was involved in trafficking narcotics, and Bernal-Martinez said yes. RP 131-32. Bernal-Martinez indicated he was being paid to stash drugs at his house, and that money found in his house was proceeds of drug sales. RP 132.

The search of the apartment revealed over $42,000.00 in United States currency and more than six pounds of heroin. RP 29-30, CP 41. There was $11,000.00 of currency found located in Bernal-Martinez's wallet. CP 41. A little more than $25,000.00 of the currency was found in a box in the hall closet of the apartment. RP 41. Almost $15,000.00 was found in a nightstand, and just under $1,000.00 was found on Ponce-Gutierrez. CP 42. The residence was within 1,000 feet of four school bus stop locations. CP 42.

The trial court denied Bernal-Martinez's motion to suppress evidence and entered findings of fact and conclusions of law. CP 34-39, RP 222-32. Bernal-Martinez chose to proceed with a stipulated facts trial to the bench. RP 237, 269, CP 30-32. The trial court entered findings of

fact and conclusions of law on the non-jury trial. CP 40-43. The trial court found Bernal-Martinez guilty of Possession of a Controlled Substance with Intent to Deliver-Heroin, and that this crime was committed within 1,000 feet of a school bus route stop. CP 43.

C. ARGUMENT AS TO WHY PETITION SHOULD BE DISMISSED

A personal restraint petition is not a substitute for a direct appeal. *In re Pers. Restraint of Hagler*, 97 Wn.2d 818, 823-24, 650 P.2d 1103 (1982). The petitioner must prove either a constitutional error that caused actual prejudice or a nonconstitutional error that caused a complete miscarriage of justice. *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). The petitioner must state the facts on which he bases his claim of unlawful restraint and describe the evidence available to support the allegations; conclusory allegations alone are insufficient. RAP 16.7(a)(2)(i); *In re Pers. Restraint of Williams*, 111 Wn.2d 353, 365, 759 P.2d 436 (1988); *In re Pers. Restraint of Stockwell*, 161 Wn.App. 329, 254 P.3d 899 (2011).

In evaluating a personal restraint petition, the Court may: (1) dismiss the petition if the petitioner fails to make a prima facie showing of constitutional or nonconstitutional error; (2) remand for a full hearing if the petitioner makes a prima facie showing but the merits of the

contentions cannot be determined solely from the record; or (3) grant the personal restraint petition without further hearing if the petitioner has proven actual prejudice or a miscarriage of justice. *Cook*, 114 Wn.2d at 810-11; *In re Pers. Restraint of Hews*, 99 Wn.2d 80, 88, 660 P.2d 263 (1983). Any inferences, if any, must be drawn in favor of the validity of the judgment and sentence and not against it. *Hagler,* 97 Wn.2d at 825-26.

A mere showing of error is not enough in a personal restraint petition. The petitioner must show that "more likely than not, he was actually prejudiced by the claimed error." *Hews*, 99 Wn.2d at 89. The test for determining whether a Court should grant a petition is stated in *Hagler, supra* as:

> [The petitioner] must shoulder the burden of showing, not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.

Hagler, 97 Wn.2d at 825 (citing *United States v. Frady*, 456 U.S. 152, 170, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982)).

A petitioner must do more than simply claim a conviction is unconstitutional. More is required. *In re Pers. Restraint of Williams*, 111 Wn.2d 353, 364, 759 P.2d 436 (1988). A personal restraint petition must be supported by affidavits or declarations stating particular facts, certified documents, certified transcripts, and the like. *Id.*

I. THE TRIAL COURT DID HOLD A HEARING FINDING PROBABLE CAUSE TO SUPPORT BERNAL-MARTINEZ'S ARREST WITHIN 48 HOURS

Bernal-Martinez alleges in his petition that the trial court accepted a waiver of probable cause from him. However, the documentation contained in the clerk's papers as CP 1-2 clearly shows the trial court was presented with a probable cause affidavit signed by Detective Hall and that the Honorable Diane Woolard made a finding of probable cause to support the arrest on March 15, 2012, at 9:30am, well within the 48 hour time limit set forth by CrR 3.2.1. CP 2. Bernal-Martinez does not support his allegation with any facts and all the evidence available shows the trial court did hold a probable cause hearing and found probable cause to exist. This claim fails.

II. BERNAL-MARTINEZ'S RIGHT TO A SPEEDY TRIAL WAS NOT VIOLATED

Bernal-Martinez claims his right to a speedy trial was violated because his last waiver of speedy trial was effective October 11, 2012, and trial did not take place until February 20, 2013. However, Bernal-Martinez offers incorrect facts to support his argument. He signed a waiver of his right to speedy trial with a new effective date of December 17, 2012. *See* Appendix B. This would mean, without calculating in any excluded time

for continuances, that at a bare minimum Bernal-Martinez's speedy trial right would expire on February 15, 2013. However, CrR 3.3(e)(3) provides that any delay granted by the court as a continuance pursuant to subsection f, which includes any continuances upon the motion of a party or the court, is excluded from the calculation of speedy trial. On December 13, 2012, it is clear a continuance was granted and the trial date was reset. *See* Appendix C. December 13, 2012, represented still 0 days elapsed on Bernal-Martinez's speedy trial clock as his waiver commenced December 17, 2012. The time between December 13, 2012, and February 11, 2013, is excluded from the speedy trial calculation pursuant to CrR 3.3(e)(3).

The parties are clear in their discussion with the court and in written documentation, *See* Appendix D, that the trial began on February 12, 2013, and concluded on February 20, 2013. Therefore, under a proper interpretation of CrR 3.3, Bernal-Martinez's trial began on day 1 of his speedy trial clock, but even under Bernal-Martinez's improper interpretation of the court rule, his trial began within the 60 day time limit provided for in CrR 3.3, on day 57 of speedy trial. This clearly does not violate the court rule right to speedy trial of which Bernal-Martinez complains.

III. BERNAL-MARTINEZ WAIVED HIS RIGHT TO A JURY TRIAL FREELY AND VOLUNTARILY

Bernal-Martinez argues his waiver to a jury trial was invalid because he did not file a written waiver of his right to jury. However, Bernal-Martinez did orally waive his right to a jury trial, and the circumstances surrounding the trial in this case show that was his intent. Furthermore, Bernal-Martinez cannot show he was prejudiced by his trial to the bench.

A defendant may waive his constitutional right to a jury trial. *State v. Forza*, 70 Wn.2d 69, 71, 422 P.2d 475 (1966). Such a waiver must either be done in writing or orally on the record. *State v. Treat*, 109 Wn.App. 419, 427, 35 P.3d 1192 (2001). On review, the court considers whether the defendant is informed of his constitutional right to a jury trial and whether the facts and circumstances generally show the waiver was done knowingly, intelligently and voluntarily. *State v. Ramirez-Dominguez*, 140 Wn.App. 233, 240, 165 P.3d 391 (2007) (citing *City of Seattle v. Williams*, 101 Wn.2d 445, 451, 680 P.2d 1051 (1984) and *State v. Downs*, 36 Wn.App. 143, 145, 672 P.2d 416 (1983)). Oral waivers on the record are sufficient if made knowingly, intelligently and voluntarily. *State v. Stegall*, 124 Wn.2d 719, 724-25, 881 P.2d 979 (1994); *State v. Donahue*, 76 Wn.App. 695, 697, 887 P.2d 485, *rev. denied*, 126 Wn.2d

1023 (1995). When reviewing an oral waiver of the right to a jury trial, the Court starts from a presumption against the validity of the waiver, which is overcome by an adequate record to the contrary. *Ramirez-Domiguez*, 140 Wn.App. at 240 (citing *State v. Wicke*, 91 Wn.2d 638, 645, 591 P.2d 452 (1979)).

On review, a Court will refuse to find a valid waiver where a defendant does not affirmatively waive his right to a jury trial. *City of Bellevue v. Acrey*, 103 Wn.2d 203, 207, 691 P.2d 957 (1984). However, an affirmative waiver of the right to jury is sufficient and a written waiver is not necessary. *See Treat*, 109 Wn.App. at 427. In *Donahue,* the Court found an oral waiver sufficient where the defendant orally addressed the trial court directly, indicating he waived his right to a jury trial, and where he did not present any evidence he was misled or coerced. *Donahue,* 76 Wn. App. 695, 697, 887 P.2d 485 (1995). Bernal-Martinez, though he did not sign a written waiver of his right to a jury trial, told the trial court when asked that he was waiving his right to a jury trial. RP 266. Bernal-Martinez at the same time did sign a written waiver of his right to confront witnesses or bring any witnesses on his own behalf. CP 30. Furthermore, Bernal-Martinez agreed to stipulated facts to be presented to the Court and within two documentary stipulations agreed to the statement that he had previously "entered a knowing, intelligent and voluntary written waiver of

his right to trial by a jury...." CP 32, 40. It is clear from the record as a whole, and his oral waiver of his right, that Bernal-Martinez knowingly, intelligently, and voluntarily waived his right to a trial by jury. The record further shows this was Bernal-Martinez's intent simply to preserve his right to appeal the trial court's denial of his suppression motion. RP 237. As the Court in *State v. Brand*, 55 Wn.App. 780, 780 P.2d 894 (1989) noted, "...competent defendants and experienced counsel may have good reasons to waive a jury...." *Brand*, 55 Wn.App. at 786. Here, Bernal-Martinez's attorney expressly told the trial court that "...the only thing we're trying to do here is preserve the right to appeal the—the 3.6 hearing." RP 237. Bernal-Martinez had a strategy and a valid reason to waive his right to a jury trial. All the circumstances, when considered as a whole, show Bernal-Martinez knowingly, intelligently, and voluntarily waived his right to have his case heard by a jury. He accomplished his intent- he preserved his right to appeal the trial court's ruling on the CrR 3.6 hearing.

Even if this Court finds that Bernal-Martinez did not knowingly, intelligently, and voluntarily waive his right to a jury trial, in order to grant Bernal-Martinez's petition, this Court must find he was prejudiced by this error. Bernal-Martinez does not contest the validity of his stipulations regarding the evidence admitted at trial. This evidence shows

Bernal-Martinez was in possession of over six pounds of heroin, $42,000.00 of United States currency, and that he made statements to police that he was involved in trafficking drugs, and that all the money found in his apartment was the result of drug sales. CP 42. There is overwhelming evidence of Bernal-Martinez's guilt, and the outcome would have been no different had he proceeded to a jury trial and therefore Bernal-Martinez cannot show he was prejudiced by the error below. As such, the Court should not grant his petition.

IV. SUFFICIENT EVIDENCE SUPPORTS BERNAL-MARTINEZ'S CONVICTION FOR POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DELIVER

Bernal-Martinez alleges there was insufficient evidence that he possessed the heroin with the intent to deliver it. The test for determining sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Green,* 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all

inferences that reasonably can be drawn therefrom. *State v. Theroff*, 25 Wn.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980).

Washington cases where intent to deliver was inferred from the possession of a quantity of narcotics all involved at least one additional factor. For example, in *State v. Llamas–Villa,* 67 Wn.App. 448, 836 P.2d 239 (1992), possession of cocaine, heroin, and $3,200.00, combined with an officer's observations of deals supported the inference of intent. In *State v. Lane,* 56 Wn.App. 286, 297, 786 P.2d 277 (1989), 1 ounce of cocaine, together with large amounts of cash and scales supported an intent to deliver, where the court specifically noted that cocaine is commonly sold by the ⅛ ounce. The Court in *State v. Simpson,* 22 Wn.App. 572, 590 P.2d 1276 (1979) held possession of cocaine, uncut heroin, lactose for cutting, and balloons for packaging supported an inference of intent to deliver.

In this case, at trial, Bernal-Martinez stipulated that police found six pounds of heroin in his apartment along with $42,000.00 in United States currency. CP 42. Bernal-Martinez also stipulated that he told police he did not have a job or source of income and that all the money found in the apartment was the result of "drug sales." CP 42. Bernal-Martinez further stipulated that police found "drug notes" in his apartment, a document with names of individuals, dates and dollar amounts. CP 42.

The police also found drug packaging material and electronic scales in Bernal-Martinez's apartment. CP 42. Taking all this evidence in the light most favorable to the State, and interpreting it most strongly against Bernal-Martinez, there is more than sufficient evidence to support the element of the crime that Bernal-Martinez possessed the heroin with the intent to deliver it.

V. SUFFICIENT EVIDENCE SUPPORTS THE FINDING THAT BERNAL-MARTINEZ COMMITTED THE CRIME WITHIN 1,000 FEET OF A SCHOOL BUS STOP

Bernal-Martinez claims there is insufficient evidence to support the trial court's finding that he committed his crime within 1,000 feet of a school bus stop. However, Bernal-Martinez stipulated to the fact that his apartment was located within 1,000 feet of four separate school bus stop locations as recognized by the Vancouver School District. CP 42. It is clear from this stipulation that sufficient evidence exists to support the trial court's finding. Bernal-Martinez bases his argument upon a mistaken belief that the State had to prove he intended to deliver the drugs to a certain person within 1,000 feet of the school bus stop. However, the elements of the crime, and the State's burden, is simply that the defendant possessed the controlled substance with the intent to deliver it, and further

that he did that within 1,000 feet of a school bus stop. *See* RCW 69.50.401(1), (2)(a); RCW 69.50.435(1)(b). The wording of the school bus stop enhancement statute requires the state prove that

> "any person who violates RCW 69.50.401 by...possessing with the intent to...deliver a controlled substance listed under RCW 69.50.401....
>
> (c) within one thousand feet of a school bus stop designated by the school district;
> ...
> may be punished by a fine up to twice the fine otherwise authorized by this chapter....or by imprisonment of up to twice the imprisonment otherwise authorized by this chapter...."

RCW 69.50.435.

This statute clearly does not require proof that a defendant have a specific intent to sell or deliver drugs to a certain person within a school bus stop zone. Bernal-Martinez's claim is, in essence, asking this court to add elements to the crime which do not exist and which the Legislature has never approved. His claim fails.

VI. TRIAL COURT DID NOT ERR IN DENYING BERNAL-MARTINEZ'S MOTION TO SUPPRESS

In addition to his counsel's arguments on direct appeal regarding the trial court's denial of his motion to suppress evidence, Bernal-Martinez argues here for the first time that police violated the "knock and announce" rule and therefore his motion should have been granted. First,

the trial court cannot be faulted for failing to grant a motion which was never made. Bernal-Martinez never moved to suppress the evidence based upon failure of the police to comply with the "knock and announce" warnings. Furthermore, as discussed extensively in his direct appeal and the State's response, which it incorporates herein, police had lawful authority to enter the residence based upon the invitation from co-defendant, Ponce-Gutierrez, to enter the residence upon his assertions he lived there and was the sole occupant. Also, police testified at the CrR 3.6 hearing that they did announce themselves once Ponce-Gutierrez unlocked the door to the residence. RP 24.

Bernal-Martinez must meet his burden of proving actual prejudice in his petition. Bernal-Martinez cites to *State v. Chichester*, 48 Wn.App. 257, 738 P.2d 329 (1987) to support his contention that when officers enter an apartment without first knocking and announcing that any subsequent entry is invalid. However, in *Chichester*, the trial court found that a person who has equal right to occupation of the premises may consent to entry onto the premises. *Chichester*, 48 Wn.App. at 259. Ponce-Gutierrez as a cohabitant had equal right to consent to entry by the police, which he clearly did based upon the trial court's findings.

The "knock and announce" statute that Bernal-Martinez complains the police violated does not apply to consensual entry onto the premises.

State v. Sturgeon, 46 Wn.App. 181, 182, 730 P.2d 93 (1986). This rule, codified as RCW 10.31.040 requires police to give notice of his or her office (as a police officer) and purpose prior to breaking any doors or windows in order to gain admittance to a dwelling. RCW 10.31.040. This statute only applies when officer seek to enter a premises without valid permission. *State v. Thompson*, 112 Wn.App. 787, 793, 51 P.3d 143, *reversed on other grounds,* 151 Wn.2d 793, 92 P.3d 228 (2004). The concerns underlying the basis for the "knock and announce" rule are dangers of potential violence and property damage. *Chichester*, 48 Wn.App. at 261. Those concerns were not present in the consensual entry with the believed sole occupant of the apartment with the police. Bernal-Martinez's argument is wholly without merit as the knock and announce rule does not apply in this situation and police had valid consent to enter the premises.

Bernal-Martinez also argues that his consent was a product of coercion. The evidence presented at the CrR 3.6 hearing shows that Bernal-Martinez's consent was voluntarily given after having been informed of his rights to refuse to consent, revoke consent, or limit the scope of the search. Bernal-Martinez's claim of coercion is not supported by the record.

Whether consent is voluntarily given is question of fact. *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966). This question is based on the totality of the circumstances and the court should consider whether *Miranda* warnings were given, the degree of education and intelligence of the consenting person, and whether the consenting person was advised of his right not to give consent. *State v. Reichenbach*, 153 Wn.2d 126, 132, 101 P.3d 80 (2004). The trial court below entered findings that Detective Hall spoke with Bernal-Martinez, provided him with a Spanish version of the *Ferrier* warnings, orally discussed *Ferrier* with Bernal-Martinez, and that Bernal-Martinez indicated he understood the warnings and was willing to consent to a search of his residence. CP 37. As discussed above, these findings are supported by substantial evidence and are verities on appeal. The trial court further found that there was no coercion of Bernal-Martinez in obtaining his consent. RP 228. The trial court stated,

> The consent was not a product of any coercion by law enforcement. I think that was—was answered most definitively by Mr. Bernal-Martinez when he was on the stand, and he indicated that, in his discussions with Detective Hall, that Detective Hall did not have a warrant with him and—and Detective Hall—and Bernal-Martinez asked Detective Hall if he was going to –what he would do if he objected, and Mr. – Detective Hall said that "I'm—I'm not going to tell you that because I don't want to influence you. I don't want to be coercive in this—in this case to get your consent."

RP 228-29.

This evidences that it was clear to Bernal-Martinez that he had the right not to consent to a search of his residence, and that police did not want to coerce him to obtain his consent. Bernal-Martinez's argument that he did not freely give consent is without any merit.

It is evident from Bernal-Martinez's exchange with Detective Hall and his testimony at the CrR 3.6 hearing that he was not totally naïve in criminal matters and that he was not of low intelligence. Further, Bernal-Martinez was not subjected to nearly the coercive type of environment that the defendant in *Flowers, supra* had been subjected to. Only one of four witnesses at the CrR 3.6 hearing testified that a gun was drawn and the trial court did not make a finding that any gun had been drawn. Even Bernal-Martinez acknowledged that he spoke to the detective in a private room, both sitting on a bed, and that the officer indicated he had no intention of threatening him or implying he would search without his consent. RP 171, 173-74. Bernal-Martinez also acknowledged Detective Hall gave him a form explaining his rights regarding consent in Spanish and that he signed that form. RP 174-75. Bernal-Martinez argues in his petition that the time spent with Detective Hall, 40 minutes, and his claim that the *Ferrier* warnings were incorrectly translated shows coercion. However, Bernal-Martinez offers no support in the law to show that 40

minutes of time spent talking with a police officer automatically equals coercion. The record below shows only that the time spent discussing the issue with Bernal-Martinez was to make sure he understood his rights and to assure him they were not coercing him. *See* RP 171, 173-74. No evidence supports Bernal-Martinez's contention that his consent was the product of coercion.

Bernal-Martinez further argues the *Ferrier* warnings were incorrectly translated. However, Bernal-Martinez offers no evidence to support this claim in his personal restraint petition. A petitioner must do more than simply claim a conviction is unconstitutional. More is required. *In re Pers. Restraint of Williams*, 111 Wn.2d 353, 364, 759 P.2d 436 (1988). A personal restraint petition must be supported by affidavits or declarations stating particular facts, certified documents, certified transcripts, and the like. *Id.* Bernal-Martinez includes none of these. Furthermore, as discussed in his direct appeal, a search online shows a valid meaning for the word "registro" is "search." Like many languages, including English, some words have different meanings based upon the context in which they are used. A translation of the word "registro" is "search" according to the Oxford Dictionary, available at www.oxforddictionaries.com/us/translate/spanish-english/registro. This document offers that in police contexts, the word "registro" is used to

mean search warrant ("orden de registro") and also search, for example: "la policia ha efectuado 300 registros domiciliarios" is translated as "the police have carried out searches on 300 houses." This additional evidence shows Bernal-Martinez's claim that "registro" cannot mean "search" is without merit. But furthermore, the record below only establishes that Detective Hall properly informed Bernal-Martinez of his rights under *Ferrier*. RP 94, 100. Bernal-Martinez, when he testified at the CrR 3.6 hearing never indicated that he did not understand the *Ferrier* warnings given by Detective Hall or that the translation was incorrect and he believed Detective Hall meant something different. This is strong evidence that the *Ferrier* warnings given by Detective Hall were appropriate and proper.

It is clear from the totality of the circumstances that Bernal-Martinez's consent to search the residence was freely and voluntarily given. The trial court properly denied his motion to suppress based on the facts presented at the CrR 3.6 hearing and the law. Bernal-Martinez's claim has no merit.

VII. CUMULATIVE ERROR DID NOT DENY BERNAL-MARITNEZ OF A FAIR TRIAL

Bernal-Martinez claims cumulative error denied him a fair trial, but offers no argument as to which supposed errors cumulate to have

denied him a fair trial. The cumulative error doctrine is only triggered when actual trial errors are identified. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000) (finding "the cumulative effect of...insignificant errors did not deprive [the defendant] of a fair trial."). Bernal-Martinez's many claims do not amount to any actual errors that occurred in his case. Bernal-Martinez was not denied a fair trial; there were no errors to justify reversal and no accumulation of errors sufficient to justify reversal. His conviction should be affirmed.

D. CONCLUSION

For all the foregoing reasons, the personal restraint petition should be dismissed.

DATED this 23rd day of June, 2014.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By: _____
RACHAEL R. PROBSTFELD, WSBA #37878
Deputy Prosecuting Attorney

APPENDIX A

(13) Jail x2

Brian Walker (C7)

S8

FILED
FEB 20 2013
2:51pm
Scott G. Webber, Clerk, Clark Co.

Superior Court of Washington
County of Clark

State of Washington, Plaintiff,

vs.

JOSE ALONSO BERNAL-MARTINEZ,
Defendant.

SID: _____
If no SID, use DOB: 7/9/1985

No. 12-1-00509-5 ✓ 13-9-00814-8

Felony Judgment and Sentence -- Prison (FJS)

☒ **Clerk's Action Required, para 2.1, 4.1, 4.3, 5.2, 5.3, 5.5 and 5.7**
☐ **Defendant Used Motor Vehicle**
☐ **Juvenile Decline** ☐ **Mandatory** ☐ **Discretionary**

I. Hearing

1.1 The court conducted a sentencing hearing this date; the defendant, the defendant's lawyer, and the (deputy) prosecuting attorney were present.

II. Findings

There being no reason why judgment should not be pronounced, in accordance with the proceedings in this case, the court ***Finds:***

2.1 Current Offenses: The defendant is guilty of the following offenses, based upon
☒ guilty plea 2/20/2013 ☐ jury-verdict ☐ bench trial :

Count	Crime	RCW (w/subsection)	Class	Date of Crime
01	POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DELIVER - HEROIN	9A.08.020(3)/69.50.401(1),(2)(a)	FB	3/14/2012

Class: FA (Felony-A), FB (Felony-B), FC (Felony-C)
(If the crime is a drug offense, include the type of drug in the second column.)
☐ Additional current offenses are attached in Appendix 2.1a.
The jury returned a special verdict or the court made a special finding with regard to the following:
☐ The defendant used a **firearm** in the commission of the offense in Count _____. RCW 9.94A.825, 9.94A.533.
☐ The defendant used a **deadly weapon other than a firearm** in committing the offense in Count _____. RCW 9.94A.825, 9.94A.533.
☒ Count 01, **Violation of the Uniform Controlled Substances Act (VUCSA)**, RCW 69.50.401 and RCW 69.50.435, took place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, public transit vehicle, or public transit stop shelter; or in, or within 1000 feet of the perimeter of a civic center designated as a drug-

LW MM

free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.

☐ The defendant committed a crime involving the manufacture of methamphetamine, including its salts, isomers, and salts of isomers, **when a juvenile was present in or upon the premises of manufacture** in Count _____. RCW 9.94A.605, RCW 69.50.401, RCW 69.50.440.

☐ Count _____ is a **criminal street gang**-related felony offense in which the defendant compensated, threatened, or solicited a **minor** in order to involve that minor in the commission of the offense. RCW 9.94A.833.

☐ Count _____ is the crime of **unlawful possession of a firearm** and the defendant was a **criminal street gang** member or associate when the defendant committed the crime. RCW 9.94A.702, 9.94A._____.

☐ The defendant committed ☐ **vehicular homicide** ☐ **vehicular assault** proximately caused by driving a vehicle while under the influence of intoxicating liquor or drug or by operating a vehicle in a reckless manner. The offense is, therefore, deemed a violent offense. RCW 9.94A.030.

☐ Count _____ involves **attempting to elude** a police vehicle and during the commission of the crime the defendant endangered one or more persons other than the defendant or the pursuing law enforcement officer. RCW 9.94A.834.

☐ Count _____ is a felony in the commission of which the defendant used a **motor vehicle**. RCW46.20.285.

☐ The defendant has a **chemical dependency** that has contributed to the offense(s). RCW 9.94A.607.

☐ For the crime(s) charged in Count _____ **domestic violence** was pled and proved. **RCW 10.99.020.**

☐ Counts _____ encompass the same criminal conduct and count as one crime in determining the offender score. RCW 9.94A.589.

☐ **Other current convictions listed under different cause numbers used in calculating the offender score are** (list offense and cause number):

	Crime	Cause Number	Court (county & state)
1.			

☐ Additional current convictions listed under different cause numbers used in calculating the offender score are attached in Appendix 2.1b.

2.2 Criminal History (RCW 9.94A.525):

	Crime	Date of Crime	Date of Sentence	Sentencing Court (County & State)	A or J Adult, Juv.	DV?*	Type
1	No known felony convictions						

*DV: Domestic Violence was pled and proved

☐ Additional criminal history is attached in Appendix 2.2.

☐ The defendant committed a current offense while on community placement/community custody (adds one point to score). RCW 9.94A.525.

☐ The prior convictions for _____ are one offense for purposes of determining the offender score (RCW 9.94A.525)

☐ The prior convictions for _____ are not counted as points but as enhancements pursuant to RCW 46.61.520.

2.3 Sentencing Data:

Count No.	Offender Score	Seriousness Level	Standard Range (not including enhancements)	Plus Enhancements*	Total Standard Range (including enhancements)	Maximum Term	Maximum Fine
01	0	II - D	12 MONTHS to 20 MONTHS	(V)	36 MONTHS to 44 MONTHS	10 YEARS	$25,000.00

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, see RCW 46.61.520, (JP) Juvenile present, (CSG) criminal street gang involving minor, (AE) endangerment while attempting to elude.

☐ Additional current offense sentencing data is attached in Appendix 2.3.

For violent offenses, most serious offenses, or armed offenders, recommended **sentencing agreements or plea agreements** are ☐ attached ☐ as follows: _____.

2.4 ☐ Exceptional Sentence. The court finds substantial and compelling reasons that justify an exceptional sentence:

☐ below the standard range for Count(s) _____.

☐ above the standard range for Count(s) _____.

☐ The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.

☐ Aggravating factors were ☐ stipulated by the defendant, ☐ found by the court after the defendant waived jury trial, ☐ found by jury, by special interrogatory.

☐ within the standard range for Count(s) _____, but served consecutively to Count(s) _____.

Findings of fact and conclusions of law are attached in Appendix 2.4. ☐ Jury's special interrogatory is attached. The Prosecuting Attorney ☐ did ☐ did not recommend a similar sentence.

2.5 Ability to Pay Legal Financial Obligations. The court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds:

☒ That the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

☐ The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

_____.

☐ The defendant has the present means to pay costs of incarceration. RCW 9.94A.760.

III. Judgment

3.1 The defendant is ***guilty*** of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.

3.2 ☐ The court ***dismisses*** Counts _____ in the charging document.

IV. Sentence and Order

It is ordered:

4.1 Confinement. The court sentences the defendant to total confinement as follows:

(a) ***Confinement.*** RCW 9.94A.589. A term of total confinement in the custody of the Department of Corrections (DOC):

36 months on Count 01

☐ The confinement time on Count(s)_____ contain(s) a mandatory minimum term of _____.

☒ The confinement time on Count 01 includes _____ months as enhancement for ☐ firearm ☐ deadly weapon ☒ VUCSA in a protected zone
☐ manufacture of methamphetamine with juvenile present.

Actual number of months of total confinement ordered is: _____.

All counts shall be served concurrently, except for the portion of those counts for which there is an enhancement as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: _____.

The sentence herein shall run consecutively with any other sentence previously imposed in any other case, including other cases in District Court or Superior Court, unless otherwise specified herein:

_____.

Confinement shall commence immediately unless otherwise set forth here: _____

_____.

(b) ***Credit for Time Served***: The defendant shall receive 343 days credit for time served prior to sentencing for confinement that was solely under this cause number. RCW 9.94A.505. The jail shall compute earned early release credits (good time) pursuant to its policies and procedures

(c) ☐ ***Work Ethic Program***. RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic program. The court recommends that the defendant serve the sentence at a work ethic program. Upon completion of work ethic program, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions in Section 4.2. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of confinement.

4.2 Community Custody. (To determine which offenses are eligible for or required for community custody see RCW 9.94A.701)

(A) The defendant shall be on community custody for the longer of:

(1) the period of early release. RCW 9.94A.728(1)(2); or

(2) the period imposed by the court, as follows:

Count(s) _____ 36 months for Serious Violent Offenses
Count(s) _____ 18 months for Violent Offenses
Count(s) 12 12 months (for crimes against a person, drug offenses, or offenses involving the unlawful possession of a firearm by a street gang member or associate)

(B) While on community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) notify DOC of any change in defendant's address or employment; (4) not consume controlled substances except pursuant to lawfully issued prescriptions; (5) not unlawfully possess controlled substances while on community custody; (6) not own, use, or possess firearms or ammunition; (7) pay supervision fees as determined by DOC; (8) perform affirmative acts as required by DOC to confirm compliance with the orders of the court; and (9) abide by any additional conditions imposed by DOC under RCW 9.94A.704 and .706. The defendant's residence location and living arrangements are subject to the prior approval of DOC while on community custody.

The court orders that during the period of supervision the defendant shall:

☐ consume no alcohol.
☐ have no contact with: _____.
☐ remain ☐ within ☐ outside of a specified geographical boundary, to wit:

_____.

☐ not serve in any paid or volunteer capacity where he or she has control or supervision of minors under 13 years of age.
☐ participate in the following crime-related treatment or counseling services:

_____.

☒ undergo an evaluation for treatment for ☐ domestic violence ☒ substance abuse ☐ mental health ☐ anger management, and fully comply with all recommended treatment. _____
☐ comply with the following crime-related prohibitions:_____

_____

_____.

☐ Additional conditions are imposed in Appendix 4.2, if attached or are as follows:

_____

_____

_____.

Court Ordered Treatment: If any court orders mental health or chemical dependency treatment, the defendant must notify DOC and the defendant must release treatment information to DOC for the duration of incarceration and supervision. RCW 9.94A.562.

4.3 Legal Financial Obligations: The defendant shall pay to the clerk of this court:

JASS CODE			
RTN/RJN	$_____	Restitution to: _____ (Name and Address--address may be withheld and provided confidentially to Clerk of the Court's office.)	
PCV	$ 500.00	Victim assessment	RCW 7.68.035
PDV	_____	Domestic Violence assessment	RCW 10.99.080
CRC	$ 200.00	Court costs, including RCW 9.94A.760, 9.94A.505, 10.01.160, 10.46.190	
		Criminal filing fee $ 200.00 FRC	
		Witness costs $_____ WFR	
		Sheriff service fees $_____ SFR/SFS/SFW/WRF	
		Jury demand fee $_____ JFR	
		Extradition costs $_____ EXT	
		Other $_____	
PUB	$ _____	Fees for court appointed attorney and trial per diem, if applicable	RCW 9.94A.760
WFR	$ 200.00	Court appointed defense expert and other defense costs	RCW 9.94A.760
	$_____	DUI fines, fees and assessments	
FCM/MTH	$ 500.00	Fine RCW 9A.20.021; ☒ VUCSA chapter 69.50 RCW, ☐ VUCSA additional fine deferred due to indigency RCW 69.50.430	
CDF/LDI/FCD NTF/SAD/SDI	$1,000.00	Drug enforcement Fund # ☐ 1015 ☒ 1017 (TF)	RCW 9.94A.760
	$ 100.00	DNA collection fee	RCW 43.43.7541
CLF	$ 100.00	Crime lab fee ☐ suspended due to indigency	RCW 43.43.690

FPV	$_____	Specialized forest products	RCW 76.48.140
RTN/RJN	$_____	Emergency response costs (Vehicular Assault, Vehicular Homicide, Felony DUI only, $1000 maximum)	RCW 38.52.430
	$_____	Other fines or costs for:_____	
	$_____	***Total***	RCW 9.94A.760

☐ The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

☐ shall be set by the prosecutor.

☐ is scheduled for_____(date).

☐ The defendant waives any right to be present at any restitution hearing (sign initials):_____.

☐ ***Restitution*** Schedule attached.

☐ Restitution ordered above shall be paid jointly and severally with:

RJN	Name of other defendant	Cause Number	Victim's name	Amount

The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8).

All payments shall be made in accordance with the policies of the clerk of the court and on a schedule established by DOC or the clerk of the court, commencing immediately, unless the court specifically sets forth the rate here: Not less than $_____ per month commencing_____. RCW 9.94A.760.

The defendant shall report to the clerk of the court or as directed by the clerk of the court to provide financial and other information as requested. RCW 9.94A.760(7)(b).

☐ The court orders the defendant to pay costs of incarceration at the rate of $_____ per day, (actual costs not to exceed $100 per day). (*JLR*) RCW 9.94A.760.

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160.

4.4 DNA Testing. The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

☐ ***HIV Testing.*** The defendant shall submit to HIV testing. RCW 70.24.340.

4.5 No Contact:

☐ The defendant shall not have contact with _____ including, but not limited to, personal, verbal, telephonic, written or contact through a third party for _____ years (which does not exceed the maximum statutory sentence).

☐ The defendant is excluded or prohibited from coming within:

☐ 500 feet ☐ 880 feet ☐ 1000 feet of:

☐ _____ (name of protected person(s))'s

☐ home/ residence ☐ work place ☐ school

☐ (other location(s)) _____

☐ other location _____,
for _____ years (which does not exceed the maximum statutory sentence).

☐ A separate Domestic Violence No-Contact Order, Antiharassment No-Contact Order, or Sexual Assault Protection Order is filed concurrent with this Judgment and Sentence.

4.6 Other: _____

_____

_____

_____

4.7 Off-Limits Order. (Known drug trafficker). RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the county jail or Department of Corrections: _____

_____.

4.8 For Offenders on Community Custody, when there is reasonable cause to believe that the defendant has violated a condition or requirement of this sentence, the defendant shall allow, and the Department of Corrections is authorized to conduct, searches of the defendant's person, residence, automobile or other personal property. Residence searches shall include access, for the purpose of visual inspection, all areas of the residence in which the defendant lives or has exclusive/joint control/access and automobiles owned or possessed by the defendant.

4.9 If the defendant is removed/deported by the U.S. Immigration and Customs Enforcement, the Community Custody time is tolled during the time that the defendant is not reporting for supervision in the United States. The defendant shall not enter the United States without the knowledge and permission of the U.S. Immigration and Customs Enforcement. If the defendant re-enters the United States, he/she shall immediately report to the Department of Corrections if on community custody or the Clerk's Collections Unit, if not on Community Custody for supervision.

V. Notices and Signatures

5.1 Collateral Attack on Judgment. If you wish to petition or move for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, you must do so within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 Length of Supervision. If you committed your offense prior to July 1, 2000, you shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. If you committed your offense on or after July 1, 2000, the court shall retain jurisdiction over you, for the purpose of your compliance with payment of the legal financial obligations, until you have completely satisfied your obligation, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505(5). The clerk of the court has authority to collect unpaid legal financial obligations at any time while you remain under the jurisdiction of the court for purposes of your legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).

5.3 Notice of Income-Withholding Action. If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections (DOC) or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.

/////

5.4 Community Custody Violation.
(a) If you are subject to a first or second violation hearing and DOC finds that you committed the violation, you may receive as a sanction up to 60 days of confinement per violation. RCW 9.94A.633.
(b) If you have not completed your maximum term of total confinement and you are subject to a third violation hearing and DOC finds that you committed the violation, DOC may return you to a state correctional facility to serve up to the remaining portion of your sentence. RCW 9.94A.714.

5.5 Firearms. **You may not own, use or possess any firearm unless your right to do so is restored by a superior court in Washington State, and by a federal court if required. You must immediately surrender any concealed pistol license.** (The clerk of the court shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

5.6 Reserved

5.7 Motor Vehicle: If the court found that you used a motor vehicle in the commission of the offense, then the Department of Licensing will revoke your driver's license. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke your driver's license. RCW 46.20.285.

5.8 Other: _____.

5.9 Persistent Offense Notice

The crime(s) in count(s) _____ is/are "most serious offense(s)." Upon a third conviction of a "most serious offense", the court will be required to sentence the defendant as a persistent offender to life imprisonment without the possibility of early release of any kind, such as parole or community custody. RCW 9.94A.030, 9.94A.570.

The crime(s) in count(s) _____ is/are one of the listed offenses in RCW 9.94A.030.(31)(b). Upon a second conviction of one of these listed offenses, the court will be required to sentence the defendant as a persistent offender to life imprisonment without the possibility of early release of any kind, such as parole or community custody.

Done in Open Court and in the presence of the defendant this date: Feb. 20, 2013.

Judge/Print Name: John F Nichols

Deputy Prosecuting Attorney	Attorney for Defendant	Defendant
WSBA No. 35678	WSBA No. 27391	Print Name:
Print Name: Erin K. Culver	Print Name: Brian A. Walker	JOSE ALONSO BERNAL-MARTINEZ

Voting Rights Statement: I acknowledge that I have lost my right to vote because of this felony conviction. If I am registered to vote, my voter registration will be cancelled.

My right to vote is provisionally restored as long as I am not under the authority of DOC (not serving a sentence of confinement in the custody of DOC and not subject to community custody as defined in RCW 9.94A.030). I must re-register before voting. The provisional right to vote may be revoked if I fail to comply with all the terms of my legal financial obligations or an agreement for the payment of legal financial obligations

My right to vote may be permanently restored by one of the following for each felony conviction: a) a certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) a court order issued by the sentencing court restoring the right, RCW 9.92.066; c) a final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) a certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 29A.84.660. Registering to vote before the right is restored is a class C felony, RCW 29A.84.140.

Defendant's signature: José Alberto Bernal

I am a certified or registered interpreter, or the court has found me otherwise qualified to interpret, in the Spanish language, which the defendant understands. I interpreted this Judgment and Sentence for the defendant into that language.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed at Vancouver, Washington on (date): 2-2-13

Interpreter

Flor de Maria Hill

Print Name

I, Scott G. Weber, Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

Witness my hand and seal of the said Superior Court affixed this date: _____.

Clerk of the Court of said county and state, by: _____, Deputy Clerk

Identification of the Defendant

JOSE ALONSO BERNAL-MARTINEZ

12-1-00509-5

SID No: _____ Date of Birth: 7/9/1985
(If no SID take fingerprint card for State Patrol)

FBI No. Local ID No. 210032

PCN No. _____ Other _____

Alias name, DOB:

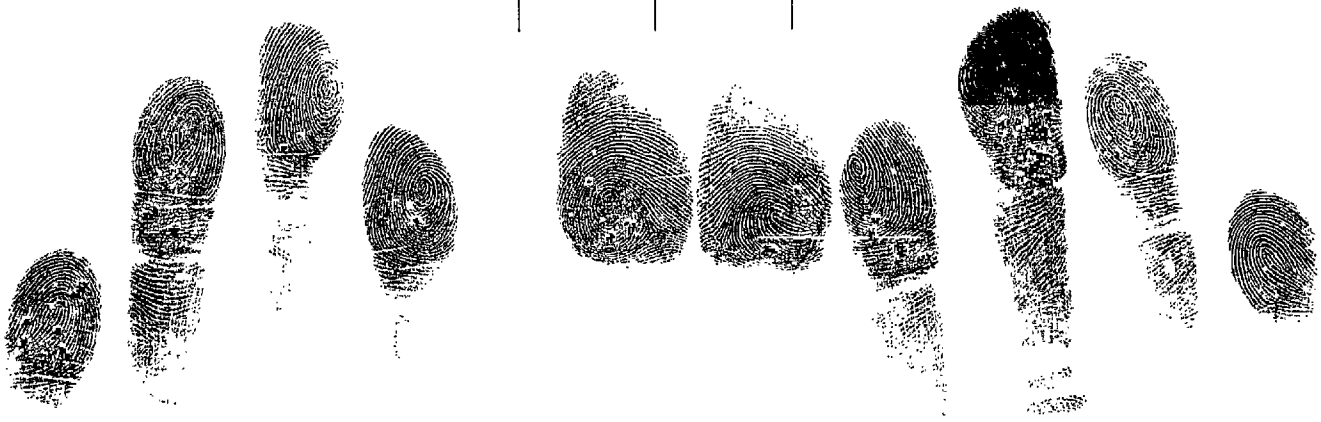
Race: W **Ethnicity:** **Sex:** M

Fingerprints: I attest that I saw the same defendant who appeared in court on this document affix his or her fingerprints and signature thereto.

Clerk of the Court, Deputy Clerk, _____ Dated: 2/20/2013

The defendant's signature: _____

Left four fingers taken simultaneously	Left Thumb	Right Thumb	Right four fingers taken simultaneously



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON, Plaintiff, v. JOSE ALONSO BERNAL-MARTINEZ, Defendant	No. 12-1-00509-5 DECLARATION OF CRIMINAL HISTORY

COME NOW the parties, and do hereby declare, pursuant to RCW 9.94A.525 that to the best of the knowledge of the defendant and his/her attorney, and the Prosecuting Attorney's Office, the defendant has the following undisputed prior criminal convictions:

CRIME	COUNTY/STATE CAUSE NO.	DATE OF CRIME	DATE OF SENTENCE	DV?*	PTS.
No known felony convictions					

* DV:Domestic Violence was pled and proved.

☐ The defendant committed a current offense while on community placement (adds one point to score). RCW 9.94A.360.

DATED this 20 day of February, 2013.

Defendant

Brian A. Walker, WSBA #27391
Attorney for Defendant

Erin K. Culver, WSBA #35678
Deputy Prosecuting Attorney

CLARK COUNTY PROSECUTING ATTORNEY
PO BOX 5000
VANCOUVER, WASHINGTON 98666
(360) 397-2261 (OFFICE)

SUPERIOR COURT OF WASHINGTON - COUNTY OF CLARK

STATE OF WASHINGTON, Plaintiff, v. JOSE ALONSO BERNAL-MARTINEZ, Defendant. SID: _____ DOB: 7/9/1985	NO. 12-1-00509-5 **WARRANT OF COMMITMENT TO STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS**

THE STATE OF WASHINGTON, to the Sheriff of Clark County, Washington, and the State of Washington, Department of Corrections, Officers in charge of correctional facilities of the State of Washington:

GREETING:

WHEREAS, the above-named defendant has been duly convicted in the Superior Court of the State of Washington of the County of Clark of the crime(s) of:

COUNT	CRIME	RCW	DATE OF CRIME
01	POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DELIVER - HEROIN	9A.08.020(3)/69.50.401(1),(2)(a)	3/14/2012

and Judgment has been pronounced and the defendant has been sentenced to a term of imprisonment in such correctional institution under the supervision of the State of Washington, Department of Corrections, as shall be designated by the State of Washington, Department of Corrections pursuant to RCW 72.13, all of which appears of record; a certified copy of said judgment being endorsed hereon and made a part hereof,

NOW, THIS IS TO COMMAND YOU, said Sheriff, to detain the defendant until called for by the transportation officers of the State of Washington, Department of Corrections, authorized to conduct defendant to the appropriate facility, and this is to command you, said Superintendent of the appropriate facility to receive defendant from said officers for confinement, classification and placement in such correctional facilities under the supervision of the State of Washington, Department of Corrections, for a term of confinement of :

COUNT	CRIME	TERM
01	POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DELIVER - HEROIN	Days/Months

These terms shall be served concurrently to each other unless specified herein:

_____

The defendant has credit for _____ days served.

The term(s) of confinement (sentence) imposed herein shall be served consecutively to any other term of confinement (sentence) which the defendant may be sentenced to under any other cause in either District Court or Superior Court unless otherwise specified herein:

And these presents shall be authority for the same.

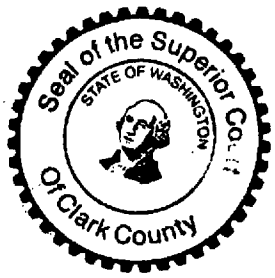
HEREIN FAIL NOT.

WITNESS, Honorable _____

JUDGE OF THE SUPERIOR COURT AND THE SEAL THEREOF THIS DATE: 2/20/2013.

SCOTT G. WEBER, Clerk of the
Clark County Superior Court

By: _____
Deputy



APPENDIX B

FILED
OCT 11 2012
1:40
Scott G. Weber, Clerk, Clark Co.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON, Plaintiff, v. JOSE ALONSO BERNAL MARTINEZ Defendant.	WAIVER OF SPEEDY TRIAL No. 12-1-00509-5

I have been informed and understand that I have the following rights:

✓ 1. The right to trial within sixty (60) days following the commencement date, as defined in CrR 3.3(e), if I am incarcerated.

✓ 2. The right to trial within ninety (90) days following the commencement date, as defined in CrR 3.3, if I am not incarcerated.

✓ 3. The constitutional right to a speedy trial.

4. The right to arraignment within 14 days after the date that the Information is filed in Superior Court. (CrR 4.1).

5. The right to have a charge filed in Superior Court within 72 hours after detention in jail or release on conditions. (CrR 3.2B(c)).

I have been informed and understand that if I do not receive a trial within the applicable time limits, the case against me will be dismissed and cannot ever be filed again. Knowing all of the above, I hereby waive (give up) these rights.

I agree to a new commencement date of 12/17/12.

DATED this 11 day of October, 2012.

Jose Alonso Bernal
Defendant

Attorney for Defendant WSBA # 2229

APPROVED:
Deputy Prosecuting Attorney, WSBA # 38878

FINDINGS AND ORDER

I have questioned the defendant and find that (1) he intelligently, knowingly and voluntarily waived the above rights to speedy trial, and (2) that he was competent to make such waiver.

DONE in Open Court this 11 day of October, 2012.

JUDGE OF THE SUPERIOR COURT

33

CLARK COUNTY PROSECUTING ATTORNEY
1013 FRANKLIN STREET • PO BOX 5000
VANCOUVER, WASHINGTON 98666-5000
(360) 397-2261 (OFFICE)
(360) 397-2230 (FAX)

APPENDIX C

FILED
DEC 13 2012 2:21
Scott G. Weber, Clerk, Clark Co.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,
Plaintiff,
v.

JOSE ALONSO BERNAL-MARTINEZ
Defendant.

SCHEDULING ORDER

No. 12-1-00509-5

IT IS HEREBY ORDERED THAT:

1. The assigned Judge is: ☐ Stahnke, Dept. 1 ☐ Wulle, Dept. 2 ☐ Nichols, Dept. 3
☐ Poyfair, Dept 4 ☐ Melnick, Dept. 5 ☐ Johnson, Dept. 6
☐ Rulli, Dept 7 ☒ Woolard, Dept. 8 ☐ Lewis, Dept. 9
☐ Collier, Dept. 10

2. The Date of Commencement: 12/17/12.

3. The Defendant shall personally appear for the following:

Readiness hearing: February 7, 2013 **at 1:30 pm.**

Trial scheduled: February 11, 2013 **at 9:00 am** (Elapsed days 56).

☒ Omnibus hearing: Dec. 21, 2012 at 9:00 am/pm.

☐ Sentencing hearing: _____ at _____am/pm.

4. Defendant shall personally appear in court for each of the dates set forth above. Failure to appear may result in the issuance of a warrant and may constitute the crime of Bail Jumping, pursuant to RCW 9A.76.170.

DATED this 13 day of December, 20 12

JUDGE OF THE SUPERIOR COURT

Jose Alonso Bernal
Defendant

Deputy Prosecuting Attorney, WSBA # 37838

Attorney for Defendant, WSBA # 2239

The Trial Prosecutor is RANDY J. ST. CLAIR

Walker
Print Name of Defense Attorney)

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SCHEDULING ORDER (Revised 09/01/11)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR CLARK COUNTY

14

Judge: LEWIS

STATE OF WASHINGTON 12/13/2012 2:13 ~~1:30~~

PA: ~~DODDS~~ Pronsfeld (P)

VS.

BERNAL-MARTINEZ, JOSE ALONSO DOB: 06/09/85

Atty: WALKER (P)

Reporter: CASSETTE

Clerk: STEINWAND

Cause# 12-1-00509-5

Charge(s): DEL/PCS W/INT HER/COC/METH/OP
MONEY LAUNDERING

~~P.O.~~ Spanish Interp. Carmen Viernier

Bkdt: 03/14/12 Cell: F2D-D Bail: 500000.00 CFN: 210032

[MUST RETURN FOR CONDITIONS BEFORE RELEASE O N BAIL]

[MUST RETURN FOR CONDITIONS BEFORE RELEASE O N BAIL]

ASSIGNED DEPT # 1 2 3 4 5 6 7 (8) 9 10 Case Reassigned to: _____

1ST APPEAR ___ARRAIGNMENT___CHANGE OF PLEA___SENT___VIOL___REV RELEASE___OMNIBUS___ READINESS X OTHR___

Defendant Appeared (Yes)/No In Custody (Yes)/No Warrant Authorized _____ Warrant Outstanding _____

Deft Answers to True Name as Charged X Advised of Civil & Constitutional Rights X

Order for Psych Eval at WSH ___sgnd Attorney _____ Appointed/ Retained/ Waived

Personal Recognizance/ Supervised Release Granted / Denied . Release Revoked _____

Bail $_____ With Conditions Set/ Return to Court to Be Set/ Previously set. Bail Posted By: _____

Diversion Referral/ Confirmation ____ Stay Granted ____ **PV: Admit ____ Deny ____ Set Hrg ____**

Next Court Appearance 12-21-12C Time 9:00 For Arraign _ Omnibus Y Payment Rev ____

PV tracking with _____ Trial in Dept # _____ Other TO BE called Late

NOT GUILTY PLEA/MOTION TO CONTINUE

Information Served on Defendant _____

Not Guilty Plea Entered _____

Motion For Continuance of Trial Granted X Denied ____

Waiver of Speedy Trial Signed _____

Readiness Hearing Date 2-7-13 RS 1:30PM

Trial Date 2-11-13 [54]

GUILTY PLEA Original/ Amended

Statement on Plea of Guilty _____ Sgnd

Psych Evaluation Ordered _____

Pre-sentence Report Ordered _____

Dismissal of Counts # _____

Sentencing Date _____

SENTENCING

Courts Finds the Defendant:

_____Guilty as Charged Based on Plea of Guilty

_____Convicted by the Jury _____Court_____

_____ in violation based on admissions

Defendant is Sentenced to Jail /DOC for_____ Days/ Months/ Years to be Served as Follows:

CTS _____JAIL_____WORK RELEASE____WORK CREW____COMM SERV____SSOSA____DOSA____

Misdemeanor Sent._____ days with _____days suspended/ deferred on conditions for _____months/ years.

Community Custody ____ Mos. HIV/ DNA ____ DNA Fee $_____ Other Costs $_____ DV Penalty $ _____

Court Costs $_____ Fine $_____Drug Fund $_____Atty Fees $_____Extrdt $_____ Lab Fee $_____

Restitution $_____ Victim Assess $_____ Deft Served With Map to DOC/COLLECTIONS____

Judgment & Sentence Signed _____ Defendant Fingerprinted Yes/No

Deft is Advised of His/ Her Rights to Appeal _____ Court Sets Appeal Bond at $_____

OMNIBUS

Def Omnibus _____Sgnd State's Omnibus _____Sgnd

Cut Off date_____

Trial set w/in speedy

40M.1

APPENDIX D

FILED
FEB 12 2013 10:30
Scott G. Weber, Clerk, Clark Co

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,
Plaintiff,
v.
JOSE ALONSO BORJAL-MARTINEZ
Defendant.

No. 12-1-00509-5

MEMORANDUM OF DISPOSITION

CRIME(S): PC/ W/ INTENT

____The defendant shall be released from custody today on the above-captioned case(s) only.

____The defendant is hereby remanded to custody: ___Hold without Bail ___Bail is set at $_____

____The defendant has been sentenced to confinement totaling _____days/months, to be served as follows:

_____ days credit for time served _____ days of additional total confinement

_____ days of additional partial confinement on:

_____work/educational release _____ work crew _____ community service

☐ Defendant shall report within 24 hours of this order/release from custody

☐ Defendant shall be screened while in custody.
(If found to be medically unfit for work crew, refer to original sentencing orders for instructions)

____ The defendant is hereby Ordered to return to court on _____ at _____am/pm.

____ The defendant shall report to the Department of Corrections within 24 hours of this order/release from custody.

____The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. Report to the CCSO within 24 hours to submit sample.

FAILURE TO REPORT TO JAIL, WORK RELEASE OR WORK CREW MAY CONSTITUTE THE CRIME OF ESCAPE AND COULD SUBJECT THE DEFENDANT TO IMMEDIATE ARREST. FAILURE TO RETURN TO COURT AS ORDERED MAY CONSTITUTE THE CRIME OF BAIL JUMP.

Other: STIPULATED FACTS TRIAL HAVING COMMENCED ON [redacted] 2/12/13, IT SHALL RESUME ON 2/20/13 AT 1:15 PM

Dated this 12 day of FEB, 2013.

Judge of the Superior Court

Defendant

Defense Atty WSBA#

Dep Pros Atty WSBA# 35678

Memorandum of Disposition - Revised 12/06

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CLARK COUNTY PROSECUTOR

June 23, 2014 - 2:32 PM

Transmittal Letter

Document Uploaded: 449226-Respondent's Brief.pdf

Case Name: State v. Bernal-Martinez

Court of Appeals Case Number: 44922-6

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Abby Rowland - Email: Abby.Rowland@clark.wa.gov

A copy of this document has been emailed to the following addresses:

wapofficemail@washapp.org